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No. 87-1152

In The

Supreme Court of the United States

October Term, 1987

Public Utilities Commission of the State of Hawaii; Albert Tom, Chairman; Sunao Kido, Commissioner; and Russel S. Nagata, Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,

Petitioners,

v.

Hawaiian Telephone Company, a Hawaii Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the District Court properly entered an order under Section 401(b) of the Communications Act of 1934 enjoining the Public Utilities Commission of Hawaii from using interstate revenues in its intrastate rate calculations, contrary to the joint Federal-state separations manual, which had been made applicable to Hawaii by an order of the Federal Communications Commission pursuant to Section 410(c) of that Act.

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PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and RUSSEL S. NAGATA, Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,

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COUNTERSTATEMENT OF THE CASE

Respondent Hawaiian Telephone Company (Hawaiian Tel)[1] provides telecommunications services

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[1] Hawaiian Tel, now known as GTE Hawaiian Telephone Company Incorporated, is a wholly-owned subsidiary of GTE Corporation (GTE). GTE is a publicly held corporation whose stock is traded on the New York Stock Exchange and other domestic and foreign exchanges. A list of principal GTE subsidiaries is printed in an appendix (RA-2).

throughout the state of Hawaii and between Hawaii and the continental United States and numerous overseas points. The Federal Communications Commission has exclusive jurisdiction over Hawaiian Tel's interstate and foreign services pursuant to the Communications Act of 1934 (Act), 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* The Public Utilities Commission of Hawaii (PUC) has jurisdiction to regulate Hawaiian Tel's intrastate public utility rates and services.

This case arose out of the PUC's improper attempt to evade the FCC's 1981 separations order requiring application of the joint Federal-state separations manual to Hawaii.[2] The U.S. District Court for the District of Hawaii enforced the FCC's order pursuant to Section 401(b) of the Act,[3] and the United States Court of Appeals for the Ninth Circuit affirmed.[4]

Jurisdictional Separations

Jurisdictional separations is the process by which telephone property, revenues, and expenses are separated (that is, allocated or assigned) between the interstate and intrastate jurisdictions. Separations is

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[2] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and Hawaii and Alaska (Docket 21263), Report & Order 81-312, 87 F.C.C.2d 18 (1981) (hereafter FCC Order 81-312), reprinted in Appendix to Petition ("A. ___") at A. 249a.

[3] Hawaiian Telephone Co. v. Public Utilities Commission, Civil No. 84-1306 (D. Haw. Mar. 28, 1985) (judgment for permanent injunction) A. 170a (hereafter Judgment for Permanent Injunction).

[4] Hawaiian Tel. v. PUC, 827 F.2d 1264 (9th Cir. 1987) (A. 1a).

required because much, if not most, of a telephone company's plant is used in common in interstate and intrastate services. *See* opinion below and authorities cited therein (A. 1a, 5a-6a); *cf. Louisiana PSC* v. *FCC*, 476 U.S. 355, 360, 375 (1986).

Since 1934 the formulation and revision of separations procedures have been the product of cooperative efforts involving the FCC, state commissions through the National Association of Regulatory Utility Commissioners (NARUC), and the telephone industry. *See New York Telephone Co.* v. *FCC*, 631 F.2d 1059, 1062 (2d Cir. 1980). The FCC establishes separations procedures only after hearing and notice to affected state commissions, 47 U.S.C. § 221(c), and after first referring the matter to a Federal-state joint board for a recommended decision, 47 U.S.C. § 410(c).

Prior to 1981, the FCC had not prescribed specific separations procedures for Hawaii. Exercising its authority under 47 U.S.C. § 410, the FCC established a joint board to advise it on fair separations procedures for Hawaii.[5] The joint board recommended that the existing NARUC-FCC Separations Manual (then embodying the so-called Ozark Plan) be made applicable, without modification, to Hawaii.[6] Based on the Joint Board's recommendation, the FCC specifically ordered that "the NARUC-FCC Separations Man-

[5] Notice of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board (Docket 21263), 64 F.C.C.2d 1033 (1977). Petitioner Albert Tom, then Chairman of the PUC, was a member of the joint board in Docket 21263.

[6] Opinion & Order in re Integration of Rates & Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland & Hawaii & Alaska (Docket 21263), 87 F.C.C.2d 20, 24 (1981) (A. 251a).

ual . . . SHALL APPLY to Hawaii and Alaska. . . ." FCC Order 81-312 (A. 249a).

Proceedings Below

In 1981 and again in 1982 Hawaiian Tel filed applications to increase intrastate rates with the PUC. The history of the proceedings in these rate cases, Dockets 4306 and 4588, is detailed in the opinion of the Ninth Circuit (A. 1a, 7a-8a). In its August, 1984, decision and order in Docket 4588, the PUC determined that a rate increase of $30,840,000 was necessary to yield a fair rate of return, but reduced the increase by $10,507,000 based on the difference between using the Ozark Plan prescribed by the FCC and its own separations plan, Hawaiian Plan II.[7] Commissioner DuPont issued a strong dissent with respect to the PUC's adoption of the separations adjustment, stating: "The use of interstate revenues for intrastate costs is illegal. Despite the protestations to the contrary, the majority continues to undercut the Ozark Plan which it ostensibly adopts."[8]

Hawaiian Tel then filed a complaint for declaratory and injunctive relief in the U.S. District Court for the District of Hawaii (A. 179a). After trial, then-Chief Judge Samuel P. King found that "[t]he PUC's action had the effect of applying Hawaiian Plan II . . . instead of the Ozark Plan as a basis for separations."[9] As a result, the court permanently enjoined the PUC and its commissioners from failing to obey

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[7] Re Hawaiian Telephone Co. (Docket No. 4588), Decision & Order No. 8042 (Aug. 14, 1984) (A. 90a).

[8] *Id.*, Dissent at 1 (A. 120a).

[9] Judgment for Permanent Injunction, ¶ 13 (A. 175a).

FCC Order 81-312 and ordered the PUC to implement rates for Hawaiian Tel sufficient to generate the $10,507,000 in annual revenues taken away by the adjustment.[10]

The district court's order was affirmed by the Ninth Circuit (A. 1a).[11] The well-reasoned majority opinion by Circuit Judge Canby addressed and disposed of each of Petitioners' contentions briefed on appeal.[12] The court of appeals held that the FCC had preempted state regulation of separations procedures, that the district court had subject matter jurisdiction under the Communications Act to issue the injunction, and that the action was not barred by the Johnson Act or by res judicata. The court, upholding the finding below that the PUC's "adjustment was in effect a thinly veiled attempt to depart from the required separation of plant and expenses between interstate and intrastate use", then affirmed the district court's order enjoining the PUC and its commissioners. (A. 29a).

ARGUMENT

The district court properly entered a judicial order enforcing the Federal Communications Commission's 1981 order making the joint separations manual applicable to Hawaii. Congress intended that such or-

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[10] *Id.* (ordering paragraphs) (A. 177a).

[11] Petitioners' petition for rehearing and their suggestion for rehearing en banc were rejected by order filed January 13, 1988, after the filing of their petition for certiorari on January 9. The order is reprinted in Respondent's Appendix at RA-1.

[12] Petitioners have attempted to raise additional questions in their petition for certiorari.

ders of the FCC have preemptive effect and that they be enforceable in the district courts pursuant to Section 401(b) of the Communications Act.

Having found that the Hawaii PUC had attempted to evade the FCC's 1981 separations order, the district court properly acted to enforce the Federal order. Contrary to Petitioners' claims, neither *Pullman* nor *Burford* abstention would have been appropriate, since the district court acted to enforce an overriding Federal order. Petitioners' remaining claims are without substance and, in most cases, were not preserved below.

So viewed, the petition presents no important issue warranting consideration by this Court.

I. CONGRESS INTENDED THE FCC'S SEPARATIONS ORDERS TO HAVE PREEMPTIVE EFFECT.

Congress intended that separations orders of the Federal Communications Commission preempt inconsistent state regulation. In *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930), this Court had held the separation of "intrastate and interstate property, revenues, and expenses" of a carrier's business to be "essential to the appropriate recognition" of the separate Federal and state competencies. *Id.* at 148.

In the 1934 Act Congress sought to achieve national uniformity in separations by authorizing the FCC to classify the property of any telephone company "and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service", after notice to the affected state commission. Section 221(c), 47 U.S.C. § 221(c) (A. 244a). In 1971 Congress added Section 410(c) to

the Act, making mandatory the states' participation in jurisdictional separations matters.[13] The separations process, the Court recently noted in *Louisiana PSC* v. *FCC*, 476 U.S. 355, 375 (1986), "facilitates the creation or recognition of distinct spheres of regulation", citing *Smith* v. *Illinois, supra*.

The court below properly read this Court's decision in *Louisiana PSC* as recognizing the preemptive effect of the FCC's separations orders. It is undeniable that Federal separations procedures are "an essential prerequisite to the creation of independent spheres of federal and state power over communications" and that "it is only *after* a uniform separations formula has been applied that a state's . . . intrastate rate-making can be protected from federal preemption." (A. 26a-27a).

The decision in *Louisiana PSC* is an important reaffirmation of the Court's historic insistence that Fed-

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[13] Congress clearly made the political decision that in the separations area the FCC should be *primus inter pares*. Under the statutory joint board procedure, separations issues are to be referred to a Federal-state joint board, composed of three Federal commissioners and four state commissioners. When the joint board's recommended decision goes before the FCC for adoption, the state commissioners may sit with the Federal commission at the hearing and "participate in its deliberations, but not vote" on the recommended decision. Section 410(c), 47 U.S.C. § 410(c) (A. 247a).

In adopting Section 410(c) in 1971, Congress specifically recognized that "the Federal Government preempts the States in the area of Federal jurisdiction" and that inevitably "the determination of the rate base at the Federal level, then, has a strong relation to the rates which are charged at the local level." S.Rept. No. 362, 92d Cong., 1st Sess., 3 (1971), 2 [1971] U.S. Code Cong. & Admin. News 1513.

eral and state commissions respect each other's "distinct spheres of regulation." 476 U.S. at 375. *Louisiana PSC* explicitly recognizes that the Communications Act establishes "a process designed to resolve what is known as 'jurisdictional separations' matters" and implicitly recognizes the FCC's preemptive authority in that area. *Id.* It is only after the jurisdictional separation has been accomplished that Section 2(b)'s protection of the "dual regulatory system" comes into play, *id.* at 370, and nothing the state commission may do within its jurisdiction can revise the boundary separating the two jurisdictions.

As applied to this case, *Louisiana PSC* supports the conclusion that Petitioner PUC may not deviate from "the correct allocation between interstate and intrastate", *id.* at 375, by using interstate revenues in its intrastate rate calculations. *Louisiana PSC* cannot properly be read as insulating state commissions from validly adopted joint board orders.

What the PUC attempted to do in its 1982 rate case order is clearly forbidden under long-standing precedents. The orders below in *Smith* v. *Illinois Bell Tel. Co.*, *supra*, were not dissimilar to the Hawaii commission's attempt here to use interstate revenues to reduce the intrastate revenue requirement. The vice in *Smith* was that the Illinois commission and the district court, in computing the revenue generated by Illinois Bell (IBT)'s investment in Chicago, had counted toward meeting IBT's intrastate revenue requirement *both* the sums IBT had received directly from local users and the share of interstate tolls that AT&T had paid over for the use of IBT's toll line in interstate calling. In reversing, this Court held that

the Illinois commission and the court below had erred in not separating out IBT's intrastate and interstate property, revenues, and expenses.[14] This Court said that it was the Interstate Commerce Commission—then charged with regulating interstate communications—that had "authority . . . to determine the amount of the revenues . . . properly attributable" to the interstate business. "[T]he validity of the order of the state commission can be suitably tested only by . . . the compensation receivable for the intrastate service under the rates prescribed." *Smith, supra,* at 149. In *NARUC* v. *FCC, supra,* the D.C. Circuit read *Smith* to prohibit the state commission from retaining interstate revenues or plant in post-separations calculations, as the Hawaii commission attempted to do below. *See NARUC* v. *FCC, supra,* at 407 n. 18, 737 F.2d at 1112 n. 18; *see also Smyth* v. *Ames,* 169 U.S. 466, 541 (1898) ("the reasonableness or unreasonableness of rates prescribed by a state . . . within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it"); *Minnesota Rate Cases,* 230 U.S. 352, 435 (1913).

The Court's opinion in *Louisiana PSC* clearly assumes that Section 2(b) does not cramp the separations process. *Id.* at 375. Nowhere in *Louisiana PSC* is there any suggestion that the order in a Section 410(c) joint board proceeding should not be binding on both the Federal and state commissions.[15] *Loui-*

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[14] The facts and holding in *Smith* are described in some detail in NARUC v. FCC, 237 U.S.App.D.C. 390, 406, 737 F.2d 1095, 1111 (1984), *cert. denied,* 469 U.S. 1227 (1985).

[15] At the hearing on Respondent's motion for preliminary in-

siana PSC specifically recognizes that the separations procedure established by Section 410(c) of the Act "facilitates the creation or recognition of distinct spheres of regulation" as called for in *Smith* v. *Illinois, supra. Id.* at 375. *Smith* is "based on the limits of state jurisdiction, rather than constraints imposed on federal agencies. . . ." *MCI* v. *FCC*, 242 U.S.App.D.C. 287, 293, 750 F.2d 135, 141 (1984). As Chief Justice Hughes had later pointed out, this jurisdictional "segregation of . . . business was essential in order to *confine* the exercise of *state* power to its own proper province." *Lone Star Gas Co.* v. *Texas*, 304 U.S. 224, 241 (1938) (emphasis supplied). The states would not be so *confined* if they were not *bound* by the outcome of separations proceedings.

That the states are bound by the joint board orders allocating subclasses of revenues and expenses jurisdictionally does not invade the states' prerogative of setting intrastate rates recognized in *Louisiana PSC*. It merely means that the state regulators may pass only on the allowability *vel non* of all costs, etc., properly assigned to the intrastate jurisdiction by the separations process. The states may not ignore recovery of proper intrastate costs nor may they jurisdictionally reassign them. *Louisiana PSC* does not permit the states, with respect to depreciation arising from

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junction, the PUC's counsel stated that the PUC's orders "specifically held that the commission agrees with the company and with the FCC that the separations formula must remain intact for each governmental authority to assert its own jurisdiction." (Tr-2 at 8; *see also* A. 17a-18a, 22a-23a n. 28). In their petition for rehearing in the Ninth Circuit, all Petitioners conceded that "There is no doubt that the FCC has preempted the area of separations rules that . . . prevent state tribunals from 'cooking the books' . . . ." (*Op. cit.* at 7).

plant assigned to intrastate, to evade their responsibility for depreciation charges by reassigning the property to interstate. Similarly, they may not unilaterally "appropriate" interstate revenues.[16]

II. THE FCC'S ORDER MAKING THE JOINT SEPARATIONS MANUAL APPLICABLE TO HAWAII WAS ENFORCEABLE UNDER SECTION 401(b) OF THE ACT.

The Federal Communications Commission's 1981 order, making the Joint Separations Manual applicable to Hawaii,[17] was an "order" judicially enforceable under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b). The literal language of Section 401(b) compels this result:

> If any person fails or neglects to obey *any order of the Commission other than for the payment of money*, . . . the Commission or *any party injured thereby* . . ., may apply to the appropriate district court of the United States for the enforcement of such order.
> * * *

47 U.S.C. § 401(b) (emphasis supplied) (A. 245a).

The Petitioners' claim that the FCC's 1981 order, because non-adjudicatory, is not properly an "order"

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[16] *See* Smyth v. Ames, Minnesota Rate Cases, Smith v. Illinois, *ubi supra.*

[17] Integration of Rates and Services, 87 F.C.C. 2d 18 (FCC81-312) (A. 249a), which (i) decreed that the "NARUC-FCC Separations Manual, which is incorporated by reference into Part 67 of the Commission's Rules and Regulations, SHALL APPLY to Hawaii . . ." and (ii) made conforming changes in Section 67.1(e) of the Commission's rules, 47 C.F.R. § 67.1(e) (A. 249a-50a).

for the purposes of Section 401(b), ignores the structure of the Act. All FCC "orders," including those in non-adjudicatory proceedings, are effective without further action of the commission.[18] Congress used the same phrase, "any order," in providing for judicial review of such matters in the next-following section of the Act.[19] Petitioners' constructional argument would attribute to the draftsman of these sections *in pari materia* the anomalous intent either to withhold judicial review of non-adjudicatory actions by the Commission under Section 402(a) or to withhold enforcement of its judicially affirmed actions under Section 401(b).

The authority in this Court on the enforceability of commission orders is to the contrary. *See Ambassador, Inc.*, v. *U.S.*, 325 U.S. 317, 325 (1945) (§ 401[b]); *CBS* v. *U.S.*, 316 U.S. 407, 417 (1942) (§ 402[a]). Moreover, five other circuits that have considered the question have specifically held that non-adjudicatory orders of the Commission are enforceable under Section 401(b).[20]

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[18] Section 408 provides in pertinent part that "all orders of the Commission, other than orders for the payment of money, shall take effect thirty calendar days from the date upon which public notice of the order is given. . . ." 47 U.S.C. § 408 (A. 246a).

[19] Section 402(a) reads as follows:

> Any proceeding to enjoin, set aside, annul, or suspend *any order* of the Commission under this Act . . . shall be brought as provided [in the Hobbs Act, now 28 U.S.C. § 2344].

47 U.S.C. § 402(a) (emphasis supplied).

[20] *See* Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 570-71 (7th Cir. 1984); Chesapeake & Potomac Tel.

Section 401(b) does not admit of a collateral attack on the validity of the FCC's 1981 order. Under the Section 401(b) procedure the district court need determine only "that the order was regularly made and duly served. . . ." Any attack on the merits of the 1981 order should have been made at the time by petition for review under Section 402(a) of the Act, 47 U.S.C. § 402(a). In fact, Chairman Tom of the Hawaii commission sat on the joint board whose recommendation led to the 1981 order, and the commission conceded below that it would be bound thereby. (A. 17a-18a and 23a n. 28; Tr-2 at 8).

III. THE DISTRICT COURT PROPERLY ENFORCED THE FCC'S ORDER.

Having found that the Hawaii PUC had attempted to evade the FCC's 1981 separations order, the district court properly acted to enforce the Federal order.

The court of appeals correctly upheld under Point VI of its opinion the trial court's finding that the

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Co. v. Public Serv. Comm'n, 748 F.2d 879, 880-81 (4th Cir. 1984), *vacated and remanded for proceedings consistent with Louisiana Pub. Serv. Comm'n v. FCC, supra*, 476 U.S. 445 (1986) (per curiam); South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107, 1115-16 (5th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 476 U.S. 1166 (1986) (mem.); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901, 907 (8th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 476 U.S. 1167 (1986) (mem.); Virginia State Corp. Comm'n v. FCC, 737 F.2d 388 (4th Cir.1984), *rev'd on other grounds sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); Southwestern Bell Tel. Co. v. Kansas Corp. Comm'n, 10th Cir. No. 84-2296 (decided April 10, 1986); *contra*, New England Tel. & Tel. Co. v. PUC, 742 F.2d 1, 4-7 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986).

Hawaii commission's intrastate "adjustment" was "a fairly transparent and improper attempt to circumvent the FCC mandate." (A. 27a). "That finding", the court of appeals held, "supports a conclusion that the PUC violated the FCC-imposed Ozark Plan." (App. 29a).[21] As such, that violation satisfies the prerequisite to invocation of Section 401(b), "if any person fails or neglects to obey any order of the Commission other than for the payment of money. . . ."

Petitioners' belated attempt to invoke the doctrines of exhaustion and abstention is misconceived and untimely. Notwithstanding this failure to brief the points below,[22] the application of either doctrine is inappropriate in this case.

By the time the district court was required to take action of substance on Respondent's requests for injunctive relief, all administrative proceedings in Docket 4588 were completed. Consequently, the exhaustion requirement of *Gibson* v. *Berryhill*, 411 U.S. 564, 574 (1973), was satisfied. In *Gibson* the Court noted that abstention under *Railroad Commission* v. *Pullman Company*, 312 U.S. 496 (1941), upon which Petitioners rely, requires a Federal court "to defer in appropriate circumstances to state *judicial* proceedings." *Id.* at 574, n. 13 (emphasis supplied). Here, there were no state judicial proceedings pending at the time the district court acted.

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[21] There is no basis for this Court's disturbing the factual finding of the lower courts. *See* Anderson v. City of Bessemer, 470 U.S. 564, 573-74 (1985); FRCP 52(a).

[22] In none of Petitioners' three briefs before the Ninth Circuit when it decided the appeal below (A. 1a) were the exhaustion, abstention, remedy, or comity questions argued.

Abstention also cannot be justified under principles espoused in *Burford* v. *Sun Oil Company*, 319 U.S. 315 (1943), cited by Petitioners at 27. In *Burford* this Court held that the Federal courts should not intervene in a manner that disrupts a state's effort to establish and administer a unified scheme for review of administrative orders. *Id.* at 333-34. Here, the district court's actions had no such disruptive effect. Although Hawaiian Tel had appealed D&O 8042 to the Hawaii Supreme Court, the appeal was dismissed following the PUC's issuance of Order 8168 on reconsideration (A. 49a-65a), which corrected certain computational errors that were the basis of Respondent's appeal. Dismissal of the state appeal occurred before the district court took any substantive action; therefore, the state's scheme for review of administrative orders was unaffected.[23]

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[23] The chronology of relevant events in the 1982 rate case was as follows:

Aug. 14, 1984—PUC issues D&O 8042 (A. 90a);

Aug. 24, 1984—Hawaiian Telephone files motion for reconsideration;

Sep. 10, 1984—Notice of appeal filed in Hawaii Supreme Court;

Nov. 2, 1984—Hawaiian Telephone files complaint in U.S. District Court for Hawaii (A. 179a);

Nov. 15, 1984—PUC issues Order No. 8168 (correcting certain computational errors) (A. 49a);

Nov. 21, 1984—Hawaiian Telephone files motion to dismiss appeal in Hawaii Supreme Court (A. 205a);

Nov. 23, 1984—PUC issues Order No. 8181 (approving rate schedules);

Dec. 7, 1984—Hawaii Supreme Court dismisses Hawaiian Telephone's appeal;

Dec. 26, 1984—District court issues preliminary injunction (A. 40a);

Mar. 21, 1985—District court issues permanent injunction (A. 169a).

Respondent's dismissal of its state appeal also eliminates concern about the *Pullman* requirement that federal courts abstain in cases where they are required to forecast the determination of unsettled questions of state law. 312 U.S. at 499-500. Respondent's state appeal was based solely on state law grounds (A. 206a-07a), and all state issues were resolved through the correction of computational errors in PUC Order No. 8168 (A. 58a-59a). Thus, when the district court was required to take substantive action on Hawaiian Tel's request for injunctive relief, no state law question essential to adjudication of the Federal claim was pending or remained undecided by state courts or the PUC. The only issues before the district court involved whether the PUC had complied with jurisdictional separations procedures prescribed by the FCC under Section 410(c) of the Communications Act and whether the action filed by Hawaiian Tel was proper under Section 401(b) of the same statute. Abstention protects a core state interest in resolution of state questions; this case presents not a state question but one of Federal uniformity. *Cf. Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 236 (1984).

The state administrative proceeding having been concluded, Hawaiian Tel was entitled to "bridge over" to the Federal system for vindication of the FCC's preemptive authority to prescribe jurisdictional separations rules and procedures. *See Bacon* v. *Rutland Railway Company*, 232 U.S. 134 (1914); *City Bank* v. *Schnader*, 291 U.S. 24 (1934), cited in *Gibson, supra*, at 574 n. 13; *cf. Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). Section 401(b) can be invoked, after all, only in the Federal courts.

Finally, Petitioners' argument that abstention is warranted under *Younger* v. *Harris*, 401 U.S. 37 (1971), is erroneous because, contrary to Petitioners' assertions, PUC Docket 4588 was not a criminal or quasi-criminal proceeding, and the PUC's decision on the separations issue was not grounded on state law regarding equitable estoppel. Ratemaking is a legislative, not an adjudicatory function, *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 226 (1908), and PUC Docket 4588 was nothing more than a general ratemaking proceeding. Moreover, the PUC did not purport to adopt the contested separations adjustment to punish Hawaiian Tel for misleading statements, as suggested by Petitioners at 26, but rather to balance the interests of the company and its ratepayers, and to fulfill the PUC's obligation to set fair and reasonable rates. (A. 104a-05a). In the Communications Act, and in Section 410(c) in particular, Congress contemplated concurrent regulation by the FCC and the state regulatory agencies within their "distinct spheres of regulation." This action enforces that Congressionally mandated separation through the remedy expressly provided in Section 401(b) of the Act. Thus, *Younger's* prohibition of Federal court injunctions interfering with critical state proceedings is wholly inapplicable.

Petitioners also argue that the findings of the court below are barred by res judicata. The court of appeals rejected this argument under Point III of its opinion (A. 20a-22a), concluding that because of differences between PUC Dockets 4306 and 4588, "[t]he causes of action are clearly not the same, and res judicata cannot apply." (A. 21a). Under Federal law, res judicata is no bar to adjudication of a different cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 591,

597-98 (1948). The same rule exists under state law as well. *Marsland* v. *International Society*, 66 Haw. 119, 125, 657 P.2d 1035, 1039 (1983), *appeal dismissed*, 464 U.S. 805 (1983). In any event, on such a question this Court should not attempt to second-guess the lower Federal courts.[24]

Further, the Hawaii Supreme Court's decision in *Re Hawaiian Telephone Company*, 67 Hawaii 370, 689 P.2d 741 (1984) (A. 66a), provides no basis for application of collateral estoppel to the district court's actions. As discussed *supra*, no question of *state* law was common to the state court's 1984 decision and the district court action below. And, although the Hawaii Supreme Court considered the issue of Federal preemption in its decision, that court's construction of the Communications Act cannot foreclose direct vindication of Federal regulation in the Federal courts under Section 401(b). *See Jefferson* v. *Gypsy Oil Company*, 27 F.2d 304, 306 (8th Cir. 1928); *Smayda* v. *U.S.*, 352 F.2d 251, 253 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966); *cf. Western Air Lines* v. *Board*, 107 S.Ct. 1038, 1043 (1987).

CONCLUSION

For the reasons set forth above and in the opinion of the court below, the petition for certiorari should be denied.

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[24] *See* U.S. v. Hohri, 96 L.Ed.2d 51, 61 n. 6 (1987); Regents v. Ewing, 474 U.S. 214, 224 n. 10 (1985), *quoting* Propper v. Clark, 337 U.S. 472, 486-87 (1949); Chardon v. Fumero Soto, 462 U.S. 650, 654 n. 5 (1983); Brockett v. Spokane Arcades, 472 U.S. 491, 499-500 (1985); Bishop v. Wood, 426 U.S. 341, 346 n. 10 (1976).

Respectfully submitted,

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APPENDIX

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HAWAII TELEPHONE COMPANY, a Hawaii Corporation, *Plaintiff-Appellee,* -vs- PUBLIC UTILITIES COMMISSION OF STATE OF HAWAII; ALBERT TOM, Chairman SUNAI KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner, *Defendants,* CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii *Intervenor-Defendant-Appellant*	FILED Jan. 13, 1988 CATHY A. CATTERSON, Clerk U.S. Court of Appeals CA No. 85-1907/1908 DC No. C-84-1306-SPK O R D E R

BEFORE: FERGUSON, CANBY AND HALL, CIRCUIT JUDGES.

A majority of the panel has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

LIST OF PRINCIPAL GTE SUBSIDIARIES PURSUANT TO RULE 28.1

In compliance with the Court's Rule 28.1, following is a listing of Respondent's parent company and its principal subsidiaries:

GTE CORPORATION

- GTE Service Corporation
- GTE Products of Connecticut Corporation
  - GTE Government Systems Corporation
  - GTE Communications Systems Corporation
  - GTE Products Corporation
  - GTE Laboratories Incorporated
  - GTE International Incorporated
    - GTE Sylvania S.p.A.
    - GTE Sylvania Licht, GmbH
    - Siemens Telecommunication International, Inc.
- GTE Communications Services Incorporated
  - GTE Sprint Communications Corporation
  - GTE Spacenet Corporation
    - Telenet Incorporated
    - Telenet Support Services Incorporated
  - GTE Valenite Corporation
  - Anglo-Canadian Telephone Company
    - British Columbia Telephone Company
      - Microtel Limited
      - Canadian Telephones and Supplies Ltd.
    - Dominion Directory Company Limited
    - Compania Dominicana de Telefonos, C. por A.
    - Quebec - Telephone

GTE Alaska Incorporated
GTE California Incorporated
GTE Florida Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE West Coast Incorporated
GTE South Incorporated
GTE Southwest Incorporated
GTE Hawaiian Telephone Company Incorporated
The Micronesian Telecommunications Corporation
GTE Data Services Incorporated
GTE Directories Corporation
GTE Finance Corporation
GTE Finance N.V.
GTE Export Factoring Company B.V.
GTE Global Corporation
GTE Investment Management Corporation
GTE Mobilnet Incorporated
GTE Realty Corporation
GTE Reinsurance Company Limited
GTE Shareholder Services Incorporated
GTE Telecom Incorporated
GTE Airfone Incorporated
GTE TeleMessager Incorporated

A more complete list of GTE subsidiaries has been filed with the Clerk by letter.